SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 891

BLANCHE ELY PARENT TEACHERS ASSOCIATION AND IRENE S. CLARKE, *Cross Petitioners*,

v.

BOARD OF PUBLIC INSTRUCTION OF BROWARD COUNTY, FLORIDA, a public body organized and existing under the laws of the State of Florida; and WILLIAM C. DRAINER, Superintendent of Public Schools of Broward County, Florida; FREDERICK ALLEN and TIMOTHY ALLEN, minors by W. GEORGE ALLEN, father and next friend; and VON D. MIZELL, President of the National Association for the Advancement of Colored People, and all others similarly situated, *Respondents*.

BRIEF OF RESPONDENTS BOARD OF PUBLIC INSTRUCTION OF BROWARD COUNTY, FLORIDA, AND WILLIAM C. DRAINER, IN REPLY TO CROSS PETITION FOR A WRIT OF CERTIORARI FILED BY CROSS PETITIONERS BLANCHE ELY PARENT TEACHERS ASSOCIATION AND IRENE S. CLARKE

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PREFACE

Pursuant to Rule 40, Paragraph 3 of the Supreme Court Rules, the School Board and its Superintendent, Respondents in this Cross Petition for Writ of Certiorari, will proceed directly to their argument in reply to that of Cross Petitioners advanced in their brief.

REASONS FOR DENIAL OF THE WRIT

INTRODUCTION

Cross Petitioners protest the phasing out of their all-Black neighborhood school, Blanche Ely High School, located in the Black community in the north-central portion of Broward County, and they protest the expedited proceedings in this school desegregation case which they say did not give them as complete a hearing as they desire.

I

Whether the Decision of the District Court for the Southern District of Florida Which Was Affirmed by the Court of Appeals Providing for the Phasing Out of a Previously All-Black High School, Blanche Ely High School, Serves To Deny to the Cross Petitioners Equal Protection Under the Law

Respondents can readily sympathize with the desire of Cross Petitioners to maintain Blanche Ely High School as a neighborhood school in their Black community. However, all-Black schools in all-Black communities are no longer constitutionally permissible no matter how much such schools may serve as a source of pride and inspiration for the community.

Cross petitioners' real point of contention with the District Court and Court of Appeals appears to be whether the record supports the finding that the Blanche Ely school building is not an adequate physical facility for conducting a high school program.

Tht record shows that during the 1969-70 school year, Respondents operated two all-Black high schools in Broward County: Dillard High School, located approximately in the center of the county, and Blanche Ely, located in the north-central area. The all-Black

high school located in the south-central area was phased out in 1968-1969.

Respondents in their plan for a unitary school system, which was filed with the District Court on February 16, 1970, proposed that both Dillard and Blanche Ely be phased out because in their opinion neither had adequate buildings for use as a high school.

The District Court referred the plan to the Florida School Desegregation Consulting Center at the University of Miami School of Education. The Desegregation Center, as part of its review of the entire plan, made extensive examination of the physical facilities at Dillard and Blanche Ely. The actual inspections were made for the Center by Dr. William Field, a recognized expert in educational facilities and specifications. See the Center's Report, filed March 27, 1970, at page 5.

Dr. Field found that Dillard contained many more special facilities than Blanche Ely. The only minimal area was the space provided for art classes which could easily be corrected by using one of the vacated vocational shop areas. See Appendix IV to the Center's Report.

On the other hand, he found that every area at Blanche Ely was minimal except for the facilities for physical education, and that without a generous increase in space, equipment and utilities, the facilities were neither adequate to serve as a senior high school nor even as a junior high school. See Appendix III to the Center's Report.

Based upon Dr. Field's examinations and other educational considerations, the Desegregation Center rec-

ommended that Dillard be continued as a high school and that Blanche Ely be discontinued.

The District Judge, the Honorable Ted Cabot, is a resident of Broward County, and based upon the recommendations of the Desegregation Center and the School Board and his own personal knowledge of the two schools, he ordered that Dillard be continued as a senior high school and that Blanche Ely be discontinued and used instead to house Coleman Elementary School until Coleman could obtain its own modern building. Another obviously important criterion is the degree of pupil integration achieved by the desegregation plan.

During the school year, 1969-70, there were two high schools serving the north area of Broward County: Blanche Ely High School with an all-Black student body and Pompano Beach High School with an integrated student body. In the current school year, 1970-71, the percentage of black students to white at Pompano Beach High School has increased from 7.3% for 1969-70 to 22.9%. The new Deerfield Beach High School which opened for the first time on August 31, 1970, has a percentage of black students to white of 31.9%. See Student Integration Statistics attached to the District Court's order of April 30, 1970 at page 1.

Another new high school in the north area is scheduled to open in time for the 1971-72 school year. Both the site for it and the new Deerfield Beach High School have been chosen with the goal of promoting integration of student bodies in contrast to the selection of sites in the past for the old Blanche Ely High School, located in an all-Black neighborhood, and Pompano Beach High School, located in an all-White neighborhood.

In view of these many factors, the Court of Appeals found that the District Court's decision to discontinue Blanche Ely as a high school was amply supported by the record, and that there was no merit in the intervenors'-cross petitioners' objection.

II

Whether the Decision of the District Court Providing for the Phasing Out of Blanche Ely High School Without Providing Cross Petitioners With a Full Hearing on the Merits of Such Action Is in Violation of the Due Process Clause Contained in the Fifth and Fourteenth Amendments of the United States Constitution

Since manifestly the school desegregation order was going to have a tremendous impact upon the people of Broward County, the District Judge adopted a liberal policy on permitting parties to intervene so that the people could have their day in court and he could hear as broad a range of arguments as possible. In addition to cross petitioners, he allowed two other groups to intervene.

Cross petitioners submitted numerous statements, resolutions, and petitions from various community groups as a proffer of the type of evidence they would offer if the court permitted a trial on the closing of Blanche Ely. While the District Judge expressed great sympathy for cross petitioners' position, as does the School Board, there simply is no way to justify the massive re-building of an all-Black school in an all-Black neighborhood. The new replacement school is now under construction at a site which makes it easily accessible to both White and Black students.

Consequently, the District Judge concluded that to allow cross petitioners a full-scale trial on the merits

would only delay the proceedings when there was a need to formulate a desegregation plan and put it into operation at once.

Respectfully submitted,

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BLANCHE ELY PARENT TEACHERS ASSOCIATION, *et al.*,

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THE BOARD OF PUBLIC INSTRUCTION OF BROWARD COUNTY, FLORIDA, *et al.*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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TABLE OF CONTENTS

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provisions and Statutes Involved 2

Statement 3

ARGUMENT 9

CONCLUSION 14

TABLE OF AUTHORITIES

Cases:

Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969) 11

Bolling v. Sharpe, 347 U.S. 497 (1954) 10

Brown v. Board of Education, 347 U.S. 483 (1954) 2, 10

Carter v. West Feliciana Parish School Board, 326 U.S. 290 (1970) 11

Davis v. Board of School Commissioners of Mobile County, No. 436, O.T. 1970 12

Green v. County School Board, 391 U.S. 430 (1968) 2, 10

PAGE

Haney v. County Board of Education of Sevier County, 429 F.2d 364 (4th Cir., 1970) 13

McGowan v. Maryland, 366 U.S. 420 (1961) 10
McLaughlin v. Florida, 379 U.S. 184 (1964) 10

Swann v. Charlotte-Mecklenburg Board of Education, Nos. 281 and 349, O.T. 1970 12

Statutes:

28 U.S.C. 1254(1) 2

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Opinions Below

The opinion of the Court of Appeals (Pet. App. A 32a-46a) is now reported at 432 F.2d 369 (5th Cir. 1970). The decision of the district court is unreported.

Jurisdiction

The decision of the Court of Appeals was entered on August 18, 1970. The petition for certiorari in No. 749 was filed on September 23, 1970. The petition for certiorari in No. 891 was filed on October 23, 1970. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

Questions Presented

No. 749

Whether the court of appeals was correct in ruling that a desegregation plan which left thirteen elementary schools all-black or virtually all-black, enrolling 68% of all-black elementary students in the system, failed to meet the desegregation requirements of *Brown* v. *Board of Education,* 347 U.S. 483 (1954) and *Green* v. *County School Board,* 391 U.S. 430 (1968) where the court found that it was feasible to desegregate totally all the virtually all-black schools by pairing and clustering those schools with nearby predominantly white schools.

No. 891

Whether the courts below were correct in approving the closing of a formerly all-black high school by the school board where there was ample evidence of the physical inferiority of the facility and no alternatives were presented to the trial court by which the school could be desegregated.

Constitutional Provisions and Statutes Involved

Pertinent excerpts from the Fourteenth Amendment to the Constitution of the United States and the Civil Rights Act of 1964 are set forth at page 5 of the petition in No. 749 and at pages 3-4 of the petition in No. 891.

Statement

No. 749

This school desegregation case was commenced on January 9, 1970 seeking injunctive relief against the continued operation of a dual, racially segregated school system in Broward County, Florida, a system which includes the city of Fort Lauderdale. At the time suit was brought there were seventeen all-black schools operating in Broward County (13 elementaries, 2 middle schools, and 2 high schools). Approximately 90.4% of the black elementary school pupils attended schools which were at least 90% black; 56.9% of the middle school black students attended schools over 99% black; and 65.5 percent of the senior high school black students attended all-black schools.

After hearings in the matter, the district court found that the board (petitioners here) was operating a dual school system in violation of the Constitution and ordered it to prepare a desegregation plan that would establish a unitary school system in Broward County. The first plan submitted by the board contained provisions for desegregating only the two all-black high schools. After a hearing was held on that plan, the board was ordered to consult with the Florida School Desegregation Consulting Center (H.E.W.), specifically with respect to desegregating the remaining all-black schools, and H.E.W. was requested to file with the court its own proposals for desegregation. The geographic zoning plan subsequently submitted by the board left ten elementary schools all-black or virtually all-black, enrolling 71% of the black elementary school population of Broward County. In contrast, the plan which H.E.W. submitted left no school all-black and reduced the percentage of black elementary students in predominantly black schools to 14%. This result was

accomplished by pairing the all-black or virtually all-black elementary schools with nearly predominantly white schools. In recommending the pairing technique, the H.E.W. report stated:

> The absence of any large concentration of black population areas in Broward County makes the effective desegregation of elementary schools a distinct possibility. In the opinion of the survey team either the rezoning or pairing of elementary attendance areas can desegregate all of the remaining all-black elementary schools with a minimum of additional busing, most of which would involve distances of less than 4 miles.
>
> Rezoning may be preferred by the Broward system to pairing, but rezoning as a technique is not always feasible. In the opinion of the survey team no educational disadvantage accrues to elementary pupils in paired schools nor are paired elementary schools any more difficult to administrate.

In its final order, the district court rejected the H.E.W. recommendation on pairing and ordered implemented a modified version of the geographic zoning proposed by the board. The result of the court-ordered plan was to leave four elementary schools 100% black, and nine others with black enrollments between 90% and 99%. Sixty-three percent of the total black elementary enrollment would attend these 13 schools. In its order, the district court stated as follows with respect to other techniques for desegregating the remaining black elementaries:

> The only alternatives to leaving these schools segregated are (1) transport or "walk-in" students from noncontiguous or distant areas; or (2) "pairing" an all-white school with an all-Black school, that is, by combining the attendance areas of the "paired" schools and

> sending all students in certain grades to one of the schools and all students in the other grades to the other school. In some insances "grouping" of three or more schools is resorted to, rather than "pairing".
>
> It is difficult to justify the removal of young students to distant areas for the sole purpose of integrating a school. "Pairing" or "grouping" of schools also involves the same elements of additional transportation or "walking in." The same principles apply to attempts to integrate more blacks into predominantly White schools. The time, inconvenience, and expense involved, as well as the safety factor, are all relevant to the resolution of the problem. (Petition App. 16a).

On appeal of the lower court's decision, the 5th Circuit reversed that part dealing with desegregation of elementary schools. On this matter the court below held:

> Our examination of the record before us indicates that the pairing/clustering technique can be utilized to desegregate *every one* (Emphasis in the original) of the 13 all-black or virtually all-black elementary schools envisioned in the plan approved by the district court. This desegregation can be accomplished "without creating impractical attendance zones or inordinate transportation problems." (Petition App. 40a).

The court of appeals' order directed the district court to implement specific pairing and clusterings of schools in two of the three attendance areas in Broward County. In the third area, the court suggested six alternative pairings and groupings from which the district court could select the one alternative it regarded as most feasible. (Petition App. 40a-43a). The district court was directed to deter-